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THE RIGHT TO REFUSE TO DEAL UNDER *COLGATE*: DOCTRINE OR DELUSION

INTRODUCTION AND BACKGROUND

Since 1919, the year when the famous *Colgate*[1] case was decided, both the antitrust bar and the courts have talked about and relied on the so-called "Colgate doctrine." This area of the law has been far from clear and has probably created as much confusion in the field of antitrust law as any other concept. It is the purpose of this comment to eliminate such confusion by exposing this doctrine for what it really is. The *Colgate* defense is truly no defense at all, but rather an ineffective smokescreen behind which the antitrust defendant has sought to camouflage his allegedly conspiratorial or monopolistic devices. This comment then will demonstrate how courts find the antitrust violation in spite of, and even because of, the right to refuse to deal.

The problem started when an indictment was brought against the Colgate Co. which alleged:

> [T]he defendant knowingly and unlawfully created and engaged in a combination with said wholesale and retail dealers . . . for the purpose and with the effect of procuring adherence on the part of such dealers . . . to resale prices fixed by the defendant, and of preventing such dealers from reselling such products at lower prices, thus suppressing competition . . . in restraint of . . . trade . . . in violation of the act . . . to protect trade and commerce. . . .[2]

Following the indictment a summary was given of methods used to carry out the purposes of the combination. These included: distribution of uniform price lists among the dealers, urging them to adhere to such prices and stating that no sales would be made to those who did not adhere; requests for information on non-adhering dealers; investigation and discovery of those not adhering and placing their names on suspended lists; requests to offending dealers for assurances and promises of future adherence to prices and uniform refusals to sell to any who failed to give such assurance.

The district court dismissed the indictment and on appeal the Supreme Court in affirming said:

> Our problem is to ascertain, as accurately as may be, what interpretation the trial court placed upon the indictment—*not to interpret it* ourselves . . . [and] as interpreted below, the indictment does not charge Colgate & Company with selling its products to dealers under agreements which obligated the latter not to resell except at prices fixed by the company.[3] (Emphasis supplied.)

The Court in essence merely held there was no violation of the antitrust law since, as was found by the district court, the indictment did not allege

[1] United States v. Colgate & Co., 250 U.S. 300 (1919).
[2] Id. at 302-03.
[3] Id. at 306-07.

an agreement to maintain resale prices. It is submitted that the sole issue before the Court was whether the indictment alleged a violation of the antitrust laws, even though there was no agreement.

Unfortunately the opinion did not end here and in dicta the Court said:

> In the *absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.[4] (Emphasis supplied.)

It is submitted that this language created the confusing conclusion that the Court had held that this general conduct under any interpretation was not a violation of the antitrust law; and further, a refusal to deal to support any of these price maintenance methods was not illegal. A careful reading of the opinion would indicate that the Court did not even concern itself with the summary of conduct, its holding was based solely on what it thought the district court interpreted the indictment to mean.

The "Colgate doctrine" was born however, and to some it appeared that immunity from the antitrust laws could be attained by using refusals to deal to effectuate practices that were heretofore illegal. It is evident that at least one court, in relying on *Colgate*, believed that an actual agreement to maintain resale prices was now permissible. In *United States v. A. Schrader's Son, Inc.*[5] the district court sustained a demurrer to an indictment charging Schrader with making agreements to maintain resale prices. In its opinion the Court referred to the *Colgate* case and said:

> The tacit acquiescence of the wholesalers and retailers in the prices thus fixed is the equivalent for all practical purposes of an express agreement. . . . [I]t seems to me that it is a distinction without a difference to say that he may do so by the subterfuges and devices set forth in the [*Colgate*] opinion and not violate the Sherman Anti-trust Act, yet if he had done the same thing in form of a written agreement, adequate only to effectuate the same purpose, he would be guilty of a violation of the law.[6]

In reversing, the Supreme Court[7] in an opinion by Mr. Justice McReynolds referred to the *Colgate* case and emphasized that the Court in *Colgate* was bound by the Criminal Appeals Act to accept the district courts' interpretation of the indictment and under that interpretation "the indictment failed to charge that Colgate and Company made agreements, either express or *implied*, which undertook to obligate vendees to observe specified resale prices. . . ."[8] (Emphasis supplied.)

The Court in concluding said:

[4] Id. at 307.

[5] 264 Fed. 175 (N.D. Ohio 1919).

[6] Id. at 183-84.

[7] United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920).

[8] Id. at 99.

> It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or *implied from a course of dealing or other circumstances*—with all customers throughout the different States which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States.[9] (Emphasis supplied.)

The *Schrader* case merely held that price fixing agreements were illegal. This of course had been the holding of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*[10] and, as far as the Court was concerned, was not in conflict with *Colgate*. The *Schrader* case was significant, however, since the Court in an indirect manner discussed the problem of someone being able to circumvent the object of the antitrust laws without violating them. It is submitted that the Court's language as quoted above, with respect to agreements, namely, "whether express or *implied from a course of dealing or other circumstances* . . ."[11] (Emphasis supplied.) could very well have been an implied warning to the bar that it would not tolerate attempts to avoid the antitrust laws by using refusals to deal as a means of coercing buyers into maintaining resale prices. It appears that the Court was saying it would look beyond a refusal to deal and would imply, from the seller's conduct, an agreement to maintain resale prices and then in that method find a violation of the antitrust laws. Where the illegal conduct is found, the right to refuse to deal will not otherwise exonerate it. Further, where the illegal conduct or conspiracy has as its objective a perfected use of the refusal to deal so as to enforce a restraint of trade, *Colgate* will not prevent the courts from finding an antitrust violation.

This transparent quality of the "Colgate doctrine" became succintly apparent in *FTC v. Beech-Nut Packing Co.*[12] In this case, the FTC charged Beech-Nut with adopting and enforcing a system of price fixing agreements. Beech-Nut appealed from a cease and desist order and the United States Court of Appeals for the Second Circuit set the order aside,[13] reasoning that although it expressed its difficulty in seeing any difference between a written agreement and a tacit understanding in their effect upon the restraint of trade, it, nevertheless, regarded the case as governed by the

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[9] Id. at 99-100.

[10] 220 U.S. 373 (1911). The United States Supreme Court held for the first time that vertical agreements to maintain resale prices were illegal as a violation of the Sherman Act.

[11] Supra note 7, at 99.

[12] 257 U.S. 441 (1922).

[13] Id. at 441.

decision of the Supreme Court in *Colgate*. On appeal the Supreme Court reversed, holding that *Colgate* and *Schrader* both stood for the proposition that agreements to maintain resale prices were forbidden and further, *Schrader* specifically held such agreements could be implied from a course of dealing or other circumstances. The Court then found that Beech-Nut's course of dealing amounted to an agreement with its buyers to maintain resale prices.[14]

The three cases just discussed clearly indicate that the Court was concerned only with the question of whether the antitrust laws had been violated. It is true that in all three opinions the Court mentioned that a seller has the right to choose his own customers and that a trader could simply refuse to sell to others as well as withhold his goods from those who would not sell them at the price fixed for their resale. But, as is said by the Court in *Beech-Nut*:

> He may not, consistently with the [Sherman] act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.[15]

It is submitted that the above statement is another warning to the bar, just as the language in *Schrader* could very well have been. It would seem that the Court was informing all concerned that it was primarily interested in determining if there was an antitrust violation and it would not tolerate an avoidance of these laws under the guise of exercising the right to refuse to deal.

The lower court opinions in both *Schrader* and *Beech-Nut* would certainly indicate that both the bar and bench understood *Colgate* to mean much more than the Supreme Court intended it to mean. It would seem that the *Beech-Nut* opinion would have clarified these misconceptions; however, this was not the case and the courts and bar continued to rely on *Colgate*.[16] It would serve no purpose to examine all the cases which dealt with *Colgate* since this section is not intended to be a history of the doctrine; it is however, intended to clarify the atmosphere surrounding *Colgate*. To adequately complete such a task a brief discussion of the famous 1960 *Parke, Davis*[17] case is necessary.

The United States sought to enjoin Parke, Davis from conspiring and combining, in violation of the Sherman Act, with retail and wholesale drug-

[14] The conduct which the Court found amounted to an agreement consisted of: (1) reporting to distributors the names of dealers who would not adhere to Beech-Nut's pricing policy; (2) black listing non-adherers; (3) maintaining a special force of agents to check on pricing policies of the sellers; (4) utilization of an elaborate system of codes so that a price cutter's source would be easily ascertainable; (5) utilization of any other equivalent cooperative means of accomplishing the maintenance of prices fixed by the company. Id. at 456.

[15] Supra note 12, at 453.

[16] An examination of Shepard's United States Citations, Case Edition 1943, and Case Edition Supplement 1943-1964 will reveal that the Colgate case has been cited, referred to, distinguished or dissented from at least 100 times since Beech-Nut was decided.

[17] United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

gists to maintain the wholesale and retail prices of Parke, Davis products. The district court[18] dismissed the complaint at the close of the government's presentation of evidence, on the ground that upon the facts and the law the government had not shown a right to relief. According to the facts, Parke, Davis in attempting to maintain resale prices stated its pricing policy to its customers, but in addition sent agents around to its various distributors instructing the latter not to sell to price-cutting retailers, and further instructing that they would be cut off, not only if they sold below cost, but also if they sold to any such retailers.[19]

On these facts the district court held "the actions of [Parke, Davis] . . . were properly unilateral and sanctioned by law under the doctrine laid down in the [*Colgate* case]. . . ."[20]

On a direct appeal the Supreme Court reversed. The Court, like its predecessors in *Schrader* and *Beech-Nut*, again emphasized that in *Colgate* the Court was bound by the district court's interpretation of the indictment and by that interpretation an agreement to maintain prices was not found. The Court then discussed *Schrader* and *Beech-Nut*, as well as other cases in this area and held that Parke, Davis' conduct plainly exceeded the limitations of the "Colgate doctrine."

> Although Parke Davis' originally announced wholesaler's policy would not under *Colgate* have violated the Sherman Act, if its action thereunder was the simple refusal without more to deal with wholesalers who did not observe the wholesalers' Net Price Selling Schedule, that entire policy was tainted with the "vice of . . . illegality" . . . , when Parke Davis used it as the vehicle to gain the wholesalers' participation in the program to effectuate the retailers' adherence to the suggested retail prices.[21]

The obvious question after *Parke, Davis* was, did this case change the law? It is submitted that the answer to this question is no. The *Parke, Davis* Court had merely said what *Colgate*, *Schrader*, and *Beech-Nut* had said: that a refusal to deal is no defense to a violation of the antitrust laws.

With the discussion of these four cases now complete, it would seem that there really is no such thing as the "Colgate doctrine." All four cases seem to be primarily interested in determining if there is a violation of the antitrust laws. If there is no violation then, as *Colgate* points out, a person may support a price maintenance policy, or any other policy for that matter, by refusing to deal with non-adherers. On the other hand, as *Schrader*,

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[18] United States v. Parke, Davis & Co., 164 F. Supp. 827 (D.D.C. 1958).

[19] The facts further indicated that:

> Representatives called contemporaneously upon the retailers involved, individually, and told each that if he did not observe the suggested minimum retail prices, Parke Davis would refuse to deal with him, and that furthermore he would be unable to purchase any Parke Davis products from the wholesalers. Each of the retailers was also told that his competitors were being similarly informed.

Supra note 17, at 33-34.

[20] Supra note 18, at 829.

[21] Supra note 17, at 45-46.

Beech-Nut, and *Parke, Davis* points out, if there is a coercive program based upon a refusal to deal to support an illegal policy then the seller is not allowed to say he is merely exercising his right to choose his customers, since the illegal policy itself is all the court needs in order to find a violation of the antitrust laws. It is, therefore, a meaningless exercise to attempt to distinguish the cases subsequent to *Colgate*; or, for that matter, to even conclude that the "doctrine" has been distinguished away. Such positions assume that there was such a doctrine and that it was ever a viable defense to an antitrust violation.

Having stated this proposition in general, the comment will, in its remainder, apply it to the present state of the antitrust law. The variety of marketing situations in which the refusal to deal is used has tended to spread thin the Court's quick foreclosure of the "doctrine", and thus the *Colgate* citation is still present in numerous antitrust briefs.

RESALE PRICE MAINTENANCE

The most appropriate place to begin a present day examination of "refusals to deal" is in the area of resale price maintenance, inasmuch as the *Colgate* case itself and the leading cases in which the doctrine has been applied were cases involving resale price plans. Theoretically, there are two ways in which a manufacturer may legally control resale prices:[22] (1) By coming within the exceptions to the Sherman Act set forth in the Miller-Tydings[23] and McGuire Acts[24] or, (2) By seeking compliance with his policy among his customers by the use of the refusal to deal within the limits of the "Colgate doctrine"; *i.e.*, announcing in advance the prices at which he wants his products resold and refusing to sell to customers who do not adhere to this policy.

With an increasing number of states repealing the non-signer provisions of their fair trade laws, the effectiveness of resale price agreements under these laws becomes questionable.[25] Conversely, the use of refusals to deal as a method of enforcing resale price plans becomes proportionally more significant. The question then arises as to the practical use of refusals to deal as a method of enforcement. Is the refusal to deal, within its legal limits, an effective method of maintaining resale prices, and, as such, of importance to manufacturers and their legal counsel, or is it just a legal concept of interest only to scholars interested in the historical development of trade regulations?

[22] Hanson, Maintaining Resale Price through Refusals to Deal: A Re-Examination, 2 B.C. Ind. & Com. L. Rev. 47 (1960).

[23] 50 Stat. 693 (1937), 15 U.S.C. § 1 (1958). This Act was passed as an amendment to § 1 of the Sherman Act. It provided in general that agreements between manufacturers and retailers fixing the prices at which the retailer would sell, if legal under state law, were exempt from the federal antitrust laws.

[24] 66 Stat. 632 (1952), 15 U.S.C. § 45(a) (1958). Most state fair trade laws provided that dealers with notice of a resale price agreement, even though not parties to the agreement, were bound not to sell below the price set by the contract. These so called "non-signer" provisions were held not be covered by the Miller-Tydings exemption in the case of Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). The McGuire Act was enacted to include agreements made pursuant to such non-signer provisions within the exemption.

[25] Legislative Note, 5 B.C. Ind. & Com. L. Rev. 350, 359 (1964).

It is the purpose of this section to examine the approach of today's courts to "refusals to deal" as applied to resale price maintenance and to ascertain its effectiveness as a means of controlling resale prices.

Resale price maintenance is the name given to a policy whereby the supplier or manufacturer undertakes to set the price at which his product is to be resold. He may do this for reasons of his own or under pressure from distributors of his product. For whatever reasons, the end result is a reduction or diminution of price competition among the distributors. One of the purposes of the Sherman Act was to prevent the diminution of price competition and to effectuate this goal, both vertical[26] as well as horizontal[27] price fixing agreements have been held illegal.[28]

Aside from price-fixing agreements under state fair trade laws, the "Colgate doctrine" has been regarded, therefore, as an anomaly in the antitrust laws.[29] An undesirable economic result, namely the elimination of price competition among competitors, if produced by a horizontal or vertical *agreement*, would be struck down as illegal; yet, theoretically, the very same result, if reached not by agreement but by a series of separate and individual decisions to adhere to a manufacturer's prior announced price maintenance policy, backed up by a refusal to sell to price-cutters, would be tolerated.[30] Instead of achieving compliance through collective agreement, the same result may be achieved through effective coercion. For this reason many commentators have urged that *Colgate* be overruled.[31]

It is submitted that there is nothing for the Supreme Court to overrule, unless the Court wishes to rule that a businessman has no freedom to deal with whomever he wants. However, it is not the businessman's freedom to deal that the commentators are attacking, but his use of the right to attain otherwise illegal purposes under the antitrust laws. For this very reason it is unnecessary to withdraw this freedom as applied to resale price maintenance plans because the refusal to deal, by itself, will not support and effectuate such a plan. In order to have an effective resale price policy, it is

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[26] A vertical price fixing agreement is the name given to an agreement between a manufacturer and a retailer which sets forth the price at which the retailer will resell the manufacturer's product.

[27] Horizontal price fixing is an agreement between competing retailers to sell products at a uniform price.

[28] E.g., Dr. Miles Medical Co. v. John D. Park & Sons Co., supra note 10 (vertical agreement); United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956) (horizontal agreement).

[29] Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962).

[30] This was recognized by the Supreme Court in *Parke, Davis*:

> The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, this result is tolerated. . . .

Supra note 17, at 44.

[31] See Judge Frank's dissent in Adams-Mitchell Co. v. Cambridge Distrib. Co., 189 F.2d 913, 917 (2d Cir. 1951); Barber, Refusals to Deal, 103 U. Pa. L. Rev. 847 (1955); Turner, supra note 29; Note, 58 Yale L.J. 1121 (1949).

submitted that more than a mere refusal to deal is necessary, and the courts, opposed as they are to fixed resale prices, can almost always find some action of the manufacturer, aside from the refusal to deal, to be violative of the antitrust laws. Furthermore, if the manufacturer meticulously avoids these collateral acts and relies solely on his refusal to deal, he is unable to effectively maintain his price fixing policy.

The courts in attacking resale price plans will not look at the refusal to deal, as such, but will place it into its business setting. If they can find an agreement, or a contract, or a conspiracy between the manufacturer and the retailers adhering to the resale prices, then they need look no further, because these elements in and of themselves constitute violations of the antitrust laws.[32] If these elements are not apparent from the facts of the case, the court will look to other acts of the manufacturer, collateral to the refusal to deal, but often used to support the threat of the refusal to deal as a means of coercion. From these acts, taken as a whole, the court will infer the necessary element of agreement.[33]

The Seventh Circuit has taken an even more radical approach to price-fixing plans. In *A. C. Becken Co. v. Gemex Corp.*,[34] without finding any conspiracy or agreement, the court held a watch band manufacturer's unilateral refusal to deal with a wholesaler who would not agree to maintain minimum resale prices to be a violation of the antitrust laws. The wholesaler, Becken, had instituted a treble damage suit[35] against Gemex, the manufacturer, when the latter terminated the former's distributorship. The lower court dismissed the action, but the court of appeals reversed on the grounds that inasmuch as a resale price agreement is illegal, any refusal to deal to further such a plan is also illegal. It reasoned:

> A wrench can be used to turn bolts and nuts. It can also be used to assault a person in a robbery. Like a wrench, a manufacturer's right to stop selling to a wholesaler can be used legitimately; but it *may not* be used to accomplish an unlawful purpose.[36]

Thus, the court did not look for an agreement or conspiracy between Gemex and its distributors who resold at the stated prices, nor did it look to any acts collateral to the refusal to deal and state that such acts are so coercive as to infer a tacit agreement or combination among all who adhered to the plan. Instead, it merely looked to the ***underlying purpose*** of the refusal to deal. Finding the purpose to be unlawful the court could then condemn the refusal to deal as a means of attaining that purpose.[37] This reasoning, while

[32] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[33] Such collateral acts might include: procuring agents to report price cutters, keeping lists of price cutters, numbering packages in order to facilitate the determination of price cutters, or seeking assurances from customers that they will adhere to the price plan or that they will report price cutters. See the cases discussed in section 1 of the comment for fact situations involving these collateral acts.

[34] 272 F.2d 1 (7th Cir. 1959), cert. denied, 362 U.S. 962 (1960).

[35] The complaint alleged a violation under § 1 of the Sherman Act. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

[36] Supra note 34; at 3, 4.

[37] The court, in effect, has made the resale price maintenance plan a substantive

extreme, would seem to indicate that present day courts view a manufacturer's right to freely choose his customers as not only a restricted right but also as one that may be forfeited in instances when the manufacturer is pursuing a policy prohibited by the antitrust statutes.

Shortly after *Parke, Davis,* the court in *George W. Warner & Co. v. Black & Decker Mfg. Co.*[38] held that a distributor's complaint in a treble damage suit brought against a manufacturer,[39] who refused to deal any longer with him, stated facts sufficient to show an antitrust violation despite the *lack of any allegations of conspiracy or agreement.* The complaint alleged that the manufacturer in furtherance of a resale price maintenance policy had threatened loss of distributorship, elimination or reduction of price discounts, surveillance of bids, and the blacklisting of price cutters.[40] When the distributor disregarded the manufacturer's policy, his distributorship was terminated. The lower court, finding no allegation of agreement, dismissed the complaint.[41]

The court of appeals, however, took the view that the alleged actions collateral to the refusal to deal, if proven, were of such a coercive nature that a combination in violation of the antitrust laws could be inferred among all who adhered to the resale price policy. Relying heavily on the language of *Parke, Davis,* the court reversed the lower court by stating:

> [W]hen the manufacturer's actions go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices; then he has put together a combination in violation of the Sherman Act.[42]

The court, realizing that a refusal to deal, by itself, will not support a resale price maintenance plan, concluded that after *Parke, Davis,* "The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise."[43]

The recent case of *Klein v. American Luggage Works, Inc.*[44] would seem to suggest that situation of "Doric simplicity." American, a luggage manufacturer, maintained a resale price policy by preticketing its products with the suggested retail prices. Its salesmen advised all customers that anyone who did not adhere to the preticketed prices would be dropped as a customer. In an attempt to meticulously avoid any acts beyond this mere announcement of its policy and a refusal to deal with price-cutters, the manufacturer did not elicit any express agreements from its customers that

violation under § 1 without an agreement or conspiracy. The Supreme Court has yet to accept this viewpoint. Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).

[38] 277 F.2d 787 (2d Cir. 1960).

[39] Black & Decker is the world's largest manufacturer of portable electric power tools ordinarily used in building construction.

[40] In an attempt to control minimum sales prices on bids by its distributors to government agencies, Black & Decker allegedly issued this warning.

[41] 172 F. Supp. 221 (E.D.N.Y. 1959).

[42] Supra note 38 at 790.

[43] Ibid.

[44] 323 F.2d 787 (3d Cir. 1963).

they would maintain the resale prices nor did it have any formal method of policing adherence to the policy.

Two large department stores in the Wilmington, Delaware area adhered to the prices, but a discount retailer, Klein, sold the luggage below the preticketed prices. Customers of the other two retailers complained that the luggage could be bought in the area at a lower price. This complaint was passed on to American's salesman, which, it is submitted, would be the normal course of action in any practical business situation. Klein was warned that his continued price cutting would result in a termination of his account with American and when he still declined to adhere to American's policy, the threat was exercised. Klein then brought a private antitrust suit against American and the two department stores alleging an illegal price-fixing conspiracy.[45]

From these facts, the district court found an antitrust violation and awarded treble damages to Klein.[46] Relying on *Parke, Davis,* the court held that American's methods exceeded the limits of permissibility defined by *Colgate*[47] and that the two retailers participated with him when they complied with the prices established. The court was able to find a conspiracy by inferring (1) a tacit agreement between American and the two department stores who resold the luggage at the specified prices, and finding as a fact that (2) the stores assisted American in "ferreting out" price cutters.

On appeal the decision was reversed on the basis that the lower court's findings of the above-mentioned facts were "clearly erroneous."[48] It should be noted that the court of appeals scarcely mentioned the refusal to deal, but instead turned its attention to the collateral facts. Upon finding that the facts did not constitute an antitrust violation, it was unnecessary to discuss the refusal to deal. Thus it can be seen that a manufacturer who scrupulously avoids any acts collateral to his refusal to deal may frustrate a court's attempt to find an illegal course of dealings. Nevertheless, although the manufacturer may be able to avoid legal liability by using *just* the "refusal to deal," the question still remains whether the "refusal to deal" by itself is a *practical* method of enforcing resale price plans.

In the *Klein* case, the fact that a private suit *was instituted and successfully prosecuted* in the lower court cannot be overlooked and must be emphatically underscored. Furthermore, it should be noted that American geared its resale price to reflect the normal "mark-up" of the two large de-

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[45] A violation of § 1 of the Sherman Act was alleged, supra note 35.

[46] 206 F. Supp. 924 (D. Del. 1962), noted 4 B. C. Ind. & Com. L. Rev. 180 (1962); 62 Colum. L. Rev. 1505 (1962).

[47] The district court felt that American solicited assurance from new customers that the preticketed price would be observed; and in those instances where it didn't seek an express assurance, the customer was deluged with literature emphasizing the necessity of compliance and the sanction of refusing to deal with price cutters. From these collateral acts, the court was able to infer a tacit agreement on the part of all complying customers.

[48] Supra note 44, at 790. The court could find no evidence establishing the collateral acts which the lower court relied on. It stated, "All that the evidence established was that prospective retailers were 'advised' of American's price maintenance policy, and its expectation that those to whom it sold its lines would not sell below preticketed prices." Id. at 790-91.

partment stores who were joined as defendants. So their adherence to the preticketed prices was based more on self-interest than on American's threat to discontinue business with price cutters. Klein, a discount merchant, did not need to resell with such a large profit margin because he did not have the overhead costs of the larger department stores. He, accordingly, rejected American's proposed resale price and sold the products at a lower price. Thus it seems clear that the coercive threat of the refusal to deal had little effect on a retailer's decision to adhere or to reject American's prices.

From the reactions of the three retailers to American's price maintenance policy, it is submitted that, in general, a resale price policy can only be maintained by gearing the policy to satisfy the self-interests of the retailers. If the self-interests of the retailers is not sufficiently reflected in the policy and they refuse to adhere, a refusal to deal on the part of the manufacturer to bring them into line is more likely to result in a private antitrust suit, rather than adherence, by the rejected retailer.

In conclusion, the "Colgate doctrine" may be used legally but cannot be used practically to maintain resale prices. If a manufacturer attempts to use the refusal to deal in furtherance of such a plan, the courts can and usually will find some measures added to the simple refusal to deal which the manufacturer has carried out in order to coerce possible price-cutters. The court can then find in these added measures a degree of agreement from which it can infer a combination or conspiracy among all parties who adhere to the resale price plan. Furthermore, as in the *Klein* case, if the manufacturer does escape liability, his course of conduct will still be susceptible to careful scrutinization by the courts and any use of a refusal to deal to punish a price-cutter is an open invitation to protracted and expensive litigation. As such, it is more of a liability than a protected "right" and a businessman should think twice before using the refusal to deal—and then reject such a policy as a bad business risk!

TYING ARRANGEMENTS

While the courts admit that in theory, at least, a seller may maintain resale prices by refusals to deal, it has been shown that this result is rarely reached as a practical matter. In such cases the courts look at the surrounding circumstances rather than the refusal to deal itself and in most situations find that such circumstances and coercive conduct amount to an illegal arrangement to maintain resale prices. When dealing with tying arrangements[49] the courts seem to be more interested in the refusal to deal itself since in reality it is actually part of the tying arrangement and, thereby, impossible to separate from the actual violation. Because the coercive nature of the refusal to deal is so essential to the tying agreement, whatever "right" *Colgate* may have afforded is now merged into the determination of the presence of the tying agreement. This section of the comment will explore

[49] A tying arrangement for purposes of this section may best be described by use of a hypothetical situation. Assume *X* manufactures flashlights and batteries and will not sell the flashlights unless the buyer agrees to purchase the batteries. In essence *X* has set up a tying arrangement with the flashlights the tying product and the batteries the tied product.

the manner and effect of this submersion of the "right" into the entire fact circumstance.

As a starting point, it is necessary to show what is illegal about a tying arrangement. This may be done by reading the following statement made by the Supreme Court.

> By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the "tied" products' merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the "tied" product would convince freely choosing buyers to select it over others, anyway. Thus "[i]n the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one."[50]

It is apparent from the above that the courts take a dim view of tying arrangements and they are properly classified as illegal per se.[51]

Since a tying arrangement is illegal per se, it would seem that no further discussion is necessary. This is not true however, since three questions are raised which require analysis: (1) Will the refusal to deal be considered as a defense to a tying arrangement? (2) Does a simple refusal to deal become illegal when it is used to coerce a buyer into adhering to a tying agreement? (3) Assuming there is a tying arrangement, will the refusal to deal give rise to damages?

In dealing with question one, a discussion of *Times-Picayune v. United States*[52] should prove helpful. The *Times-Picayune* was the only morning paper in New Orleans. It also published an evening edition, and here it had a competitor. The paper *refused to sell* advertising space in its morning edition unless advertisers purchased space in its evening edition as well. The United States brought a civil suit under the Sherman Act challenging the use of these "unit" contracts as an unreasonable restraint of trade and as an attempt to monopolize trade. The district court found violations and entered a decree enjoining the use of these "unit" contracts. The Supreme Court reversed and held that a tying contract is illegal per se when a seller has a monopoly in the tying product and when a substantial volume of commerce in the tied product is thus restrained. But it concluded that *Times-Picayune* had no monopoly. This conclusion was reached by defining the market to include all three dailies instead of separating the morning and evening markets and recognizing the *Times-Picayune* monopoly in the morning field.

It is apparent that the sole issue before the Court was, did *Times-Picayune* have a monopoly or sufficient market control over the morning newspaper business so that its "unit" contracts could properly be labeled a

[50] Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 605 (1953).
[51] White Motor Co. v. United States, 372 U.S. 253, 258-60 (1963).
[52] Supra note 50.

tying arrangement. The Court did not concern itself with any such thing as the "Colgate doctrine" or a refusal to deal as a defense to antitrust violations. The Court did mention refusal to deal but almost by way of announcing that a refusal to deal itself could become an antitrust violation. As the Court said:

> Refusals to sell, without more, do not violate the law . . . [But] if accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, *even individual sellers' refusals to deal have transgressed the [Sherman] Act.*[53] (Emphasis supplied.)

It is submitted that *Times-Picayune* illustrates two points: (1) that the "Colgate doctrine" in no way affects the adjudication of the presence of a tying agreement; (2) the great risk a seller takes by attempting to enforce a tying arrangement by threatening the buyer with a refusal to deal. As to the latter, if the refusal to deal was carried out and the buyer brought a suit for treble damages, the buyer would merely have to prove there was a tying arrangement and it would be of no avail for the seller to claim he was merely refusing to deal and was within his rights in so refusing.

If the dictum in *Times-Picayune* is to become a formulated policy, then it is possible to see that in certain instances the "right to refuse to deal" has now become the basis for a separate cause of action—a result completely opposite to the "Colgate doctrine." In *Englander Motors, Inc. v. Ford Motor Co.*[54] the court seems to indicate the refusal to deal causes such a result. Englander, a Ford dealer, was required by Ford to sell only Ford parts and he was told that his dealership would be terminated if he did not adhere to this policy. Ford retained a short notice cancellation clause in its dealership agreement. Englander in a treble damage suit alleged that Ford's threats to exercise this clause forced him to sell his dealership to a Ford designee and as a result of such sale he suffered a loss.

The court of appeals, in reversing the trial court's dismissal, said:

> There is nothing intrinsically wrong with a short notice cancellation provision unless by its exercise Ford was able to coerce violations, and by its use had forced Englander to sell its business . . . but . . . the use of a short term cancellation provision for the purpose of violating the law is itself a violation of the anti-trust law.[55]

The *Englander* case is significant inasmuch as the court did not believe it necessary to first find the tying agreement before assessing damages for the refusal to deal. The court seemed impressed by the inherently coercive power of the refusal to deal being used for a purpose which *could* be considered illegal. It is interesting to note that the court used the refusal to deal itself in much the same manner the Supreme Court in *Parke, Davis*[56] and *Beech-*

[53] Id. at 625.

[54] 267 F.2d 11 (6th Cir. 1959).

[55] Id. at 15.

[56] Supra note 17.

Nut[57] looked at the seller's conduct in order to find the antitrust violation. Thus it can be said that in handling an *attempt* to monopolize—as a tying agreement is—the court may view the refusal to deal as the element that proves the attempt. In this circumstance, the claimed protection of *Colgate* is at best an empty gesture.

The total uselessness of the "Colgate doctrine" can be seen when used as a defense where, being guilty of a tying arrangement, the refusal to deal is claimed as a means of mitigating damages.

In *Osborn v. Sinclair Refining Co.*[58] the court on a previous appeal found a tying arrangement and the present appeal was to determine the damages which resulted. The tying arrangement consisted in Sinclair's requiring its dealers to sell Goodyear tires, batteries, and accessories in addition to Sinclair products as a condition to holding a franchise. Osborn, a Sinclair dealer, had his dealership terminated when it came time for renewal, because he did not sell enough of the Goodyear products. Osborn brought a treble damage suit for the loss he sustained resulting from this tying arrangement and the district court found his damages were limited to three times the difference in cost between the Goodyear products and others which could have been purchased at a lower cost. Osborn appealed claiming his damages also included the loss of profits resulting from the termination of the dealership agreement. The court of appeals in reversing the district court said:

> The defense predicated upon *Colgate*, that a seller having a policy of resale price maintenance, exclusive dealing, tie-in sales, etc., nevertheless has a qualified right to deal with whomever he wishes, is material to the question of whether the seller has put together an arrangement in violation of the antitrust laws. This defense of freedom to select one's customers is also relevant to the issue whether a particular refusal to deal was in furtherance of an unlawful arrangement or whether it was instead motivated by other considerations. However, the defense had no bearing on the issue of recoverable damages stemming from a refusal to deal which was part and parcel of an antitrust violation.[59]

The *Osborn* case looks beyond the actual tying arrangement and holds that the refusal to deal, which standing alone would be permissible, has now become illegal since "damages may be recovered for a refusal to deal in furtherance of an arrangement condemned by the antitrust laws. . . ."[60] In the present case Sinclair had a contractual right to terminate the lease when it did and it thus argued that this termination was perfectly valid. The court in rejecting this defense pointed out in a footnote:

> Nor would it be a defense to Sinclair that it had a contractual right, under the written lease and written sales agreement, to terminate the relationship on May 31, 1956. A refusal to deal based upon a

[57] Supra note 12.
[58] 324 F.2d 566 (4th Cir. 1963).
[59] Id. at 574.
[60] Id. at 574-75.

> contract provision is, in respect to the antitrust laws, no different from the right of traders generally to select their customers. In either case, the right is limited to situations where the seller has not put together an arrangement in restraint of trade.[61]

It may thus be seen that in the area of tying arrangements, not only has the "Colgate doctrine" never supported a relevant defense, but, as both *Englander* and *Osborn* point out, the "right" may have become a liability. Not only is the "right" lost in a tying arrangement, the refusal to deal becomes tainted with illegality itself when it is used to further an antitrust violation.

EXCLUSIVE DEALERSHIPS

Sometimes a manufacturer terminates an exclusive dealership at the insistence of another of his exclusive dealers, or replaces one such dealer with another. By the very nature of this type of agreement any disruption brings strong reactions. If the terminated dealer brings a private antitrust suit against the manufacturer, the latter almost invariably raises the so-called "Colgate rule" as a defense. In a recent case of this type,[62] it is stated, "[Defendants] argue that the Colgate rule has been repeatedly applied to uphold a seller's independent refusal to continue to deal with an exclusive distributor whose policies are not to the seller's liking."[63] From a cursory glance at this statement and the cases which were cited to uphold this proposition,[64] it would appear that the "Colgate rule" actually does afford a special immunity to the antitrust laws and is being used quite successfully to uphold otherwise illegal courses of conduct in this area. Relying on this mistaken belief, the antitrust bar continues to cite *Colgate* as a defense to antitrust suits. It is the purpose of this section to show that in cases involving exclusive dealerships, the seller's refusal to deal is upheld, not because of any special immunity offered by *Colgate*, but simply because his course of conduct, with which the "refusal to deal" was associated, was quite legal from the outset.

When a seller induces a distributor to handle only his line of products and to desist from handling any of his rival's lines, he has created an exclusive dealership. Although these dealerships may block off competing products from the buying public, there are many sound business considerations which justify these arrangements.[65] Therefore, exclusive dealings are not per se violations of the antitrust laws, but only become so when

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61 Id. at 575.

62 Albert H. Cayne Equip. Corp. v. Union Asbestos & Rubber Co., 220 F. Supp. 784 (S.D.N.Y. 1963).

63 Id. at 786.

64 Several of the cases cited are discussed in this section, infra.

65 With an exclusive dealer, the manufacturer can be assured that the distributor can devote full time to the sale of his goods. Furthermore, by not carrying other lines, the distributor is less apt to overextend his financial commitments, and his requirements from the manufacturer will tend to fluctuate less than if he were carrying an excessive inventory. This, in turn, would lower the manufacturer's operating costs because the manufacturer could schedule his output more efficiently every month. These are but a few of the advantages to such arrangements.

likely to "substantially lessen competition or tend to create a monopoly."[66] The exclusive dealer, by the very nature of his arrangement, does not carry competing lines. Thus, when the manufacturer terminates such a dealership, he essentially puts the dealer out of business. It is submitted, however, that when the manufacturer's conduct is upheld, it is because there is no violation of the antitrust statutes, and not because he used the "Colgate rule" to characterize as legal, an otherwise illegal act.

The holding in *Schwing Motor Co. v. Hudson Sales Corp.*[67] expresses the proper function of *Colgate:*

> Every manufacturer has a natural and complete monopoly of his particular product . . . . If he is engaged in a private business, he is free to exploit this monopoly by selling his product directly to the ultimate consumer or through one or more distributors or dealers, as he may deem most profitable to him. If he chooses the latter method, he may exercise his own independent discretion as to the parties with whom he will deal . . . [and] *a refusal to deal becomes illegal only when it produces an unreasonable restraint of trade or a monopoly forbidden by the antitrust laws.*[68] (Emphasis supplied.)

In *Schwing*, an automobile dealer whose dealership with Hudson was terminated in favor of another dealer brought a treble damage suit against Hudson and the dealer alleging a conspiracy in violation of the antitrust laws. Inasmuch as the court could find no allegation that the replacement of one dealer by another was done in an effort to extend the manufacturer's natural monopoly of its own product, or to drive out the products of competitors, it could find no allegation of illegal conduct. Without this illegal conduct to color the refusal to deal, the court dismissed the complaint. In its treatment of the case, the court focuses not on the manner in which a refusal to deal *produces* the monopoly, but only on the *existence* of the monopoly. Upon this existence the refusal to deal becomes thereby actionable; without this existence, recital of a "Colgate doctrine" is totally unnecessary.

This latter point may be further illustrated by *Packard Motor Car Co. v. Webster Motor Car Co.*[69] On a fact situation almost identical to that in *Schwing*, the lower court found a termination by Packard of Webster's automobile dealership in favor of another dealer, Zell, to be illegal. It based the decision on the fact that the termination was in furtherance of an agreement between Packard and Zell to eliminate a competitor of Zell.[70] The

[66] 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958). Section 3 of the Clayton Act covers both exclusive dealing and tying arrangements.

[67] 138 F. Supp. 899 (D. Md.), aff'd on opinion below, 239 F.2d 176 (4th Cir. 1956), cert. denied, 355 U.S. 823 (1957).

[68] 138 F. Supp. 899, 902-03 (1956).

[69] 243 F.2d 418 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957).

[70] Webster Motor Car Co. v. Packard Motor Car Co., 135 F. Supp. 4 (D.D.C. 1955). Whereas the court in *Schwing* held that an agreement between two parties to exclude another from trade is only illegal if the agreement is a horizontal one (between competitors) or, if the manufacturer dominates the market, this court found the agreement, though vertical, to be illegal by stating:

court of appeals reversed on the grounds that the agreement was not aimed at *eliminating Packard's competitors* but only at reducing competition among Packard's own dealers. It stated, "Since there are other cars 'reasonably interchangeable by consumers for the same purposes' as Packard cars . . . an exclusive contract for marketing Packards does not create a monopoly."[71] By so holding that the agreement between Zell and Packard was legal, the court could not condemn a "refusal to deal" in furtherance of a reasonable and legal restraint of trade.[72]

From both these cases it can be seen that the courts tend to view an exclusive dealer as merely an agent distributing the manufacturer's products at the consumer level. Using this approach to the dealer cases, the courts feel that if a manufacturer wants to replace one "agent" by another, or reduce the number of his "agents" in a given consumer area, he may freely do so because such conduct affects only his own products. The antitrust laws were not intended to regulate policies of a manufacturer which concern his own product or "agents," and it is only when his policies have an effect on the marketing of rival products that a violation of the statutes occur. Consequently, unless the terminated dealer who brings a private antitrust suit can prove that the termination of his dealership has such an effect, his cause of action will fail.[73]

This reasoning was applied recently in *Ace Beer Distrib., Inc. v. Kohn, Inc.*[74] In that case, Ace, an exclusive beer distributor, sued the brewery company and Kohn after its distributorship was terminated in favor of Kohn. The complaint alleged a conspiracy between Kohn and the brewery company to destroy Ace's business and to set Kohn up as the new distributor. The lower court, relying on *Packard* and *Schwing*, dismissed the action on the basis that such an agreement did not violate the Sherman Act. The court of appeals approved, stating:

> The fact that a refusal to deal with a particular buyer without more, may have an adverse effect upon the buyer's business does

> The right to select one's customers is a right that may be exercised free from compulsion and without agreements with others that tend unreasonably to restrain interstate commerce or to create a monopoly. Such a choice may not legally result from an agreement or arrangement or conspiracy between two or more individuals, or two or more business concerns, to exclude others from the channels of trade, or to attempt to create a monopoly or substantial monopoly for one of the parties to the agreement.

Id. at 8.

[71] Supra note 69, at 420.

[72] Essentially the court was upholding the agreement because it was a vertical one between non-competitors. Cf., White Motor Co. v. United States, 372 U.S. 253 (1963), noted, 5 B.C. Ind. & Com. L. Rev. 185 (1963).

[73] > [P]rivate antitrust damage suits by buyers cut off from supplies for failure to adhere to the sellers' distribution policy have uniformly failed, perhaps due to the recognition that Section 3 of the Clayton Act is fundamentally designed to protect the *seller's competitors* from being foreclosed from the market—an objective which need not comprehend safeguarding an individual buyer incidentally prejudiced by the seller's refusal to deal.

The Att'y Gen.'s Nat. Comm. to Study the Antitrust Laws (1955) at 136, n.28.

[74] 318 F.2d 283 (6th Cir. 1963).

> not make the refusal to deal a violation . . . . Unless it can be said that the refusal to deal with plaintiff had the result of suppressing competition and thus constituted "restraint of trade" within the meaning of Section 1 of the Sherman Act, there is no violation of the Act.[75]

The court concluded, "We do not think that the substitution . . . of one distributor for another had this result."[76] So again it can be seen that the "refusal to deal" was upheld because the plaintiff was unable to prove that the purpose with which it was associated was an illegal one.

In all these cases it may be noted that an exclusive dealership was terminated, not simply at the whim of the manufacturer, but at the insistence and urging of a third party who either desired the dealership himself or wished by the termination to eliminate a competitor. Yet the court in each instance found no violation because the agreement between the manufacturer and the dealer was in form a vertical one, and such agreements are tolerated under the antitrust laws.[77] When, however, the plaintiff alleges that his dealership was terminated at the request of several competing dealers, he has alleged a *horizontal* conspiracy, and the court can now find a violation of the statutes.

Such a case may be illustrated by the recent decision of *Walker Distrib. Co. v. Lucky Lager Brewing Co.*[78] There the distributor, Walker, alleged that the brewery company and its other distributors conspired to terminate Walker's dealership. The claim was dismissed by the lower court and on appeal the brewery company cited *Colgate* to defend the termination of its dealership with Walker. Declaring that exclusive dealerships are not illegal per se and that a manufacturer can terminate such a dealership, the court nevertheless felt that if there were a *horizontal* understanding among the distributors to eliminate one of their competitors, such a conspiracy would be illegal. Furthermore, it declared that inasmuch as the brewery company's termination was the result of this conspiracy, it could not rely on *Colgate* to uphold its action. The case was then remanded to determine whether a horizontal agreement did, in fact, exist. Clearly this case demonstrates that the "Colgate rule" never upholds an otherwise illegal course of conduct. Whereas in the previous cases the terminated dealer was unable to show some violation of the Sherman Act, and consequently the courts had no need to apply any "Colgate doctrine" in this case the plaintiff did allege a course of conduct which did violate the antitrust laws, and subsequently the court could denounce the termination of the dealership, but again without applying *Colgate*.

In conclusion, although the "Colgate doctrine" has been discussed by the courts in cases involving exclusive dealing, it has not been the basis on which terminations of such distributorships have been upheld. Rather, the

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[75] Id. at 287.

[76] Ibid.

[77] But see the opinion of the lower court in the *Packard* case, supra note 70 and the dissenting opinion of Bazelon, J. in the court of appeals decision, supra note 69; cf., White Motor Co. v. United States, supra note 72.

[78] 323 F.2d 1 (9th Cir. 1963).

basis of these decisions has been a reliance on the nature of the dealership itself, and until this distinction is realized by the antitrust bar, lawyers will continue to rely erroneously on *Colgate* as a defense to antitrust violations.

DETERRING ANTITRUST SUITS BY REFUSALS TO DEAL

In the previous sections of this comment, refusals to deal have been examined as being one element of the antitrust violation, usually as a method used to enforce compliance with a pattern of restraint of trade. The courts when dealing with cases involving these refusals to deal did so by determining first if there was an antitrust violation. The present section will examine a refusal to deal in the following fact situation: *A* commits an antitrust violation against *B* who then commences a private antitrust suit against *A*. As a result of this suit *A* refuses to deal with *B*. It is the purpose of this section to examine the refusal to deal used as a deterrent to antitrust prosecutions in order to determine if it is there permissible and if so, what effects it could have on private antitrust suits.

House of Materials, Inc. v. Simplicity Pattern Co.[79] dealt with a fact situation much like the above mentioned hypothetical. In a prior suit[80] brought by the FTC, the Supreme Court found that Simplicity had violated the antitrust laws. Relying on this outcome, House of Materials and other customers brought a treble damage action against Simplicity. After this suit was commenced, Simplicity notified House of Materials and the other plaintiffs that when their present contract expired it would not be renewed. House of Materials sought a preliminary injunction against Simplicity enjoining this refusal to deal. The district court[81] found that the sole motivation for Simplicity's refusal to deal with the plaintiffs was its desire to retaliate for the treble damage action brought against it by them. The court held this refusal to deal was itself a violation of the antitrust laws and granted the injunction. On appeal, the court of appeals in reversing held that Simplicity's action did not go beyond a simple refusal to deal which is permissible under *Colgate*. In its opinion the court examined the refusal to deal in order to determine whether it has brought about a violation of the antitrust laws and concluded that it had not. "There is no suggestion here that Simplicity's action constituted a violation of the anti-monopoly provision of the Sherman Act. . . . Moreover, we think it too plain to merit discussion that Simplicity's 'refusal to deal' cannot be regarded as a violation of the Clayton Act."[82] The court in reaching its decision realized that the "practical effect of Simplicity's conduct was to exert pressure on . . . [the plaintiffs] . . . to acquiesce to Simplicity's desire that it discontinue the lawsuit,"[83] but as shown above the court found that this coercion alone was no antitrust violation and thus the court could not issue an injunction under the Clayton Act.[84] The court then held that while the district court in ap-

[79] 298 F.2d 867 (2d Cir. 1962).
[80] FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959).
[81] P.W. Husserl, Inc. v. Simplicity Pattern Co., 191 F. Supp. 55 (S.D.N.Y. 1961).
[82] Supra note 79, at 871.
[83] Id. at 870.
[84] § 16 Clayton Antitrust Act, 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958), provides:

propriate cases might restrain a defendant from attempting to coerce a plaintiff into discontinuing a lawsuit, in the present case such a result would not be warranted since Simplicity's action did not violate any contractual or other legal right of House of Materials.

In *Simplicity*, the court was not faced with the same refusals to deal as were discussed in the previous sections. Here the court was dealing with a refusal to deal which was not connected with an antitrust violation. The refusal to deal in the present case, on the other hand, was under examination as a separate entity, apart from any attempt to restrain trade, and looked at in this light, the court held it did not itself constitute an antitrust violation. It is submitted that the court was correct in so holding since, as the court points out, there was nothing in the antitrust laws which made a refusal to deal a violation. The result although supportable may have an adverse effect on private antitrust suits. In the present case the court pointed out by way of background that Simplicity was by far the largest pattern maker in the country and any store which dealt in women's dress patterns would not be able to compete if it did not carry the Simplicity line. It may thus be seen that a small dealer would, in the future, be very wary of bringing a private antitrust suit against such a large supplier as Simplicity. For in doing so, he would be placing himself in a postion to be legally forced out of business by the supplier's refusal to deal with him after the suit was commenced. In reality, Simplicity or any large supplier would, by exercising its right to refuse to deal one or two times, be insuring itself from any further private antitrust suits. Certainly a small retailer would look at the prior refusals to deal as a warning that if he brought a private antitrust suit he too could have his supply stopped.

The third circuit reached a different result when faced with the same basic fact situation as *Simplicity*. In *Bergen Drug Co. v. Parke, Davis & Co.*,[85] Bergen, a drug wholesaler, brought an antitrust action against Parke, Davis and shortly after the suit was commenced Parke, Davis notified Bergen that, effective immediately, its account was being permanently closed. Bergen sought a temporary injunction pending litigation of the antitrust suit enjoining Parke, Davis from cancelling Bergen's account. The district court denied the injunction, concluding that there existed no statutory or other legal basis for granting it.[86] The court of appeals reversed and remanded with directions to grant the preliminary injunction. The court conceded that the refusal to deal was not an antitrust violation, but held that the district court as a court of equity did possess power to issue the preliminary injunction. The court seemed to achieve this conclusion by finding first, that the refusal to deal was, as Parke, Davis admitted, actuated either by a feeling of resentment or dissapproval because of the initiation of the antitrust action. Second, this refusal to deal had the effect of stifling the

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the *antitrust laws* . . . . (Emphasis supplied.)

85 307 F.2d 725 (3d Cir. 1962).

86 Bergen Drug Co. v. Parke, Davis & Co., 1961 Trade Cas. ¶ 70,151 (D.N.J.).

main action. The court in holding that the refusal to deal would hamper the principal suit, accepted Bergen's contention that such conduct would deter the obtaining of witnesses to testify in the plaintiff's behalf since the witnesses would fear that they would in turn also be cut off in retaliation for their testifying.

The court also seemed to rely on the adverse effect that this refusal to deal would generally have on private antitrust suits, as well as the irreperable harm it would have on Bergen. The court said in conclusion:

> The inconveniences, if any, that defendant will undergo if called on to continue to deal with plaintiff are slight, while those that the plaintiff has and will experience in the future are burdensome.[87]

The result reached in *Bergen* seems to be equitable and proper since, as the court points out, neither party is harmed by it. The question that must be answered is, was the court's order supported in law? In essence the court forced two parties to continue to deal where there was no legal obligation to do so. It would certainly appear that Parke, Davis has lost one of its basic rights, namely, the freedom to contract, but of course it could be argued that such a right must step aside when it conflicts with a public policy as strong as that which allows private antitrust suits.

As a result of *Simplicity* and *Bergen* it would seem apparent that no fixed conclusion may be drawn as to the use of a refusal to deal as a method of coercing a private antitrust plaintiff from continuing his suit. The *Simplicity* case on one hand refuses to enjoin the refusal to deal even though the court was aware of the adverse effect such a result would have on the private antitrust suit. On the other hand the *Bergen* court enjoined the refusal to deal even though it had to rely on its basic equity power to do so. Both cases are supportable, one in law, the other in equity. Nevertheless it would seem that the *Bergen* result is the most desirable since it protects the antitrust litigant and furthermore seems to be more in line with the courts dislike of refusals to deal which have an adverse effect on the enforcement of antitrust laws. In view of the growing list of decisions where the right to refuse to deal vanishes upon proof of an antitrust violation,[88] the *Bergen* result seems fully justifiable. There is truly no reason to condemn a refusal to deal when used to produce the antitrust violation,[89] *and yet* permit this refusal when used to protect the violation from prosecution. If this so-called "right" can become tainted with illegality of which it was a part,[90] in a like manner it must share the illegality of the conduct it seeks to harbor.

SUMMATION

In concluding, the following may be said:

(1) The so-called "Colgate doctrine" is in reality a myth which evolved from a gross misunderstanding of the *Colgate* case.

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[87] Supra note 85, at 728.

[88] A.C. Becken Co. v. Gemex Corp., 272 F.2d 1 (7th Cir. 1959), cert. denied, 362 U.S. 926 (1960).

[89] Englander Motors, Inc. v. Ford Motor Co., supra note 54.

[90] Osborn v. Sinclair Refining Co., supra note 58.

(2) A refusal to deal, as a practical matter, is at most a very limited right and courts are very reluctant to allow it to be used to circumvent the object of the antitrust laws.
(3) The courts are primarily interested in determining if there is an antitrust violation and thereby do not focus upon the refusal to deal itself but upon that conduct which substantiates the antitrust violation.
(4) A refusal to deal may actually merge with the conduct constituting an antitrust violation and thus itself give rise to a damages award.
(5) The refusal to deal is a viable issue *only* when it is independently used, *i.e.*, when it is not a part of a marketing arrangement program. The treatment that a court gives to such independent situations will much depend upon what reaction it has to the presence of any inequitable coercive results.

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